Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

ROBERT R. KRILICH, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the lower courts correctly held that a § 2255 habeas corpus petitioner is procedurally barred by the ruling of the appellate court on direct appeal from asserting a constitutional claim that depends on extra-record evidence that could not have been developed at the petitioner's original trial.

(2) Whether petitioner knowingly, intelligently, and voluntarily waived his Fifth Amendment right against self-incrimination where petitioner was induced to make incriminating proffer statements to the government based upon the prosecutor's false assurances as to the circumstances in which the petitioner's statements could be used against him.

RULE 29.6 STATEMENT

Petitioner Robert R. Krilich is a private party.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert R. Krilich, Sr. ("Krilich" or "petitioner"), respectfully petitions for a writ of certiorari to review the judgment of the Seventh Circuit in this case.

OPINIONS BELOW

The district court denied petitioner's 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence in an unpublished order. App., *infra*, 3a-19a. The district court subsequently denied petitioner's request for a Certificate of Appealability ("COA") and his motion for relief from judgment in a separate unpublished order. *Id.* at 20a-28a. The Seventh Circuit denied petitioner's application for a COA in an unpublished order. *Id.* at 1a.

JURISDICTION

The district court denied petitioner's 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence on April 6, 2001. App., *infra*, 20a-28a. On September 28, 2001, the Court of Appeals for the Seventh Circuit denied petitioner's application for a COA. *Id.* at 1a. On December 20, 2001, Justice Stevens extended petitioner's time to file this petition to February 25, 2002. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in pertinent part, that "No person * * * shall be compelled in any criminal case to be a witness against himself * * * ."

28 U.S.C. § 2253(c) provides, in pertinent part, that "[a] certificate of appealability may issue * * * only if the applicant has made a substantial showing of the denial of a constitutional right," and, "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the

court of appeals" from the denial of a petition for a writ of habeas corpus.

STATEMENT

In the spring of 1993, petitioner's son, Rob, learned he was being investigated by federal authorities for fraud. At the time, he had 12 prior convictions and faced substantial federal and state criminal charges. Confronted with the Government's knowledge of his activities, Rob Krilich sought to minimize his exposure, and immediately began to render aid to the U.S. Secret Service, the Federal Bureau of Investigation, and the Office of the U.S. Attorney for the Northern District of Illinois, among other agencies. Throughout these efforts, Rob Krilich was represented by attorney Jeffrey Steinback. R. 1, pp. 3-4.

During this same period, petitioner became the target of a separate federal investigation. The U.S. Attorney's Office investigated petitioner in connection with certain bribes paid to government officials in Oakbrook Terrace, Illinois, and for improper use of tax-free interest earned through the issue of industrial revenue bonds, a portion of which were used to finance low-income and moderate-income housing. R. 1, pp. 4-5.

In March 1993, upon learning that he was a target of the Government's investigation, petitioner also retained attorney Jeffrey Steinback. Thereafter, the U.S. Attorney invited petitioner to cooperate in the investigation of his companies' past activities. Petitioner agreed to cooperate and to provide information to the U.S. Attorney's Office in order to persuade the Government to offer his son more lenient treatment. Steinback represented petitioner in all of his meetings with government representatives, while also continuing to represent his son in his negotiations with prosecutors. R. 1, p. 4; Affidavit of Robert R. Krilich, Sr. (A35), at ¶¶ 12-13.

Prior to making any statements to the Government, petitioner was presented with a "standard proffer letter." That

letter provided that any statements made by him would not be admissible at a trial, except that the Government could introduce such statements "should [petitioner] subsequently testify contrary to the substance of the proffer or otherwise present a position inconsistent with the proffer." R. 8, Ex. 3. Counsel recommended to petitioner that he sign the proffer agreement, and advised him that if petitioner proceeded to trial, the Government could introduce his statements for impeachment purposes only if petitioner himself testified, and even then only if his testimony was inconsistent with his proffer statements. AUSA Patrick King ("King") likewise assured petitioner that the Government would only introduce his proffer if he testified at trial. At no time did King or any other government representative inform petitioner that his statements could be used against him even if petitioner never testified. R. 1, p. 5; A35-A36, ¶¶ 11-12.

After signing the proffer agreement, petitioner provided statements over a period of months to government investigators that admitted to many of the offenses the Government would later charge. After plea negotiations failed, the Government indicted petitioner on several counts, including violations of the Racketeering Influenced and Corrupt Organizations Act and 18 U.S.C. § 1014.

Petitioner's trial commenced in August 1995. In its case-in-chief, the Government presented several witnesses who testified that petitioner misused bond interest he had obtained by falsifying vendor invoices, and that he paid Richard Sarallo, the mayor of Oakbrook Terrace, sums designed to induce favorable municipal action regarding certain real estate projects. Petitioner's counsel cross-examined these government witnesses, seeking to establish that petitioner did not cause invoices to be falsified and did not bribe Mayor Sarallo. In the defense case, counsel also presented the testimony of several witnesses that a party other than petitioner was responsible for the invoices in question, and that the bribery charge was unfounded because favorable city action on petitioner's real

estate projects would have occurred in any event based on the merits of the projects. This testimony was intended to suggest that the alleged bribery was unnecessary and, by extension, did not occur. *United States v. Krilich*, 159 F.3d 1020, 1026 (7th Cir. 1998). Petitioner did not testify.

The Government moved to admit petitioner's proffer statements in connection with the Government's rebuttal case on the ground that petitioner violated the proffer agreement by "present[ing] a position inconsistent with the proffer" based on the direct and cross-examinations conducted by his counsel. The trial court held a hearing on the admissibility of the proffer statements (Tr. 9/11-12/95, 2336-2438), and held in favor of the Government based on the language of the proffer agreement and what petitioner should have understood it to mean when he signed it. The court never heard any testimony from petitioner about what he actually understood or was told about the admissibility of the proffer statements. Petitioner tried to be heard at least twice during this hearing but was either stopped by counsel or ignored by the court:

> COURT: Let me hear from the Government on the question of whether the language of the Government's letter adequately alerted the defendant to the possibility that he might be visited with a proffer should he cross examine Government witnesses in a way that he has.
>
> * * *
>
> THE DEFENDANT: Am I allowed to say anything?
>
> MR. BERKSON [Defense Counsel]: No.
>
> * * *
>
> MR. BERKSON: Just for the record your Honor, I mean it is—there is [sic] two things. Number one, I just want it said that I think that in your ruling, which is a case of first impression, basically what you have done is you have made it so that Rule 11 is a nullity.

> Someone would have to be crazy to come in and make a proffer. That's number one. I don't think that was the intent of Congress when they—
>
> THE DEFENDANT: The Government lied.
>
> MR. BERKSON: —when they enacted Rule 11. I think that's directly contrary to the intent of Congress.

Tr. 9/11/95 at 2377-2378, 2390; see also *id.* at 2381-2382, 2384-2385. Petitioner sought to testify about what he understood the conditions of the proffer to be, and how he had been misled about the meaning of the agreement. A36, ¶ 18. Without hearing any of this evidence, the trial court's ruling permitted the Government to introduce petitioner's confession, which predictably led to his conviction.

On direct appeal, petitioner's counsel argued that "evidence obtained by cross-examination of the prosecution's witnesses does not count," and should not have opened the door to petitioner's confession. The Seventh Circuit rejected that contention on the ground that counsel's reading of the proffer agreement was "unrealistic"—*i.e.*, that the terms of the agreement authorized the government to use the proffer as it did, in response to testimony elicited by petitioner's counsel on cross-examination.

Petitioner also argued on appeal that he did not knowingly and voluntarily waive his rights against admission of plea statements pursuant to Fed. R. Evid. 410 and Fed. R. Crim. P. 11(e)(6). The Seventh Circuit rejected the claim on the ground that "Krilich does not contend that his assent was coerced and offers no support for a conclusion that he didn't understand the rights that Rules 410 and 11(e)(6) confer." 159 F.3d at 1026. Petitioner did not assert any claim that admission of the proffer statements violated his Fifth Amendment right against self-incrimination, recognizing instead that he would have to raise and develop that claim in collateral proceedings because it depended on the testimony of the prosecutor and petitioner's

counsel as to the representations made about the circumstances in which his proffer statements could be used against him.

On October 3, 2000, petitioner moved to vacate his sentence pursuant to 28 U.S.C. § 2255, seeking a new trial on the grounds that the admission of his statement violated his Fifth Amendment right against self-incrimination, and that he was denied the effective assistance of counsel. R. 1. The Government moved to dismiss the petition, arguing that petitioner's claims either had already been decided by the Seventh Circuit or were waived by virtue of not having been raised on direct appeal, and also that they lacked merit. In support of its motion, the Government submitted several pieces of evidence responding to the merits of petitioner's claims, including new affidavits from petitioner's former counsel denying that they had provided ineffective representation. R. 8.

At a status hearing on January 12, 2001, the district court indicated it would rule first on the question of procedural default, and thereafter would give the parties a separate opportunity to address whether the claims lacked merit or required an evidentiary hearing. 1/12/01 Tr. (R. 13), at 19, 20-21, 23-24. In response to the district court's directive, petitioner filed a response addressing only the alleged procedural bar, postponing his submission of factual materials and legal arguments, as well as his requests to develop extra-record evidence relating to the merits, until after the court ruled on the question of procedural default.

On April 5, 2001, the district court ruled that petitioner's ineffective assistance claims were not procedurally defaulted or waived because "it is typical for a criminal defendant to base an ineffective assistance of counsel claim on evidence outside the trial record," and because "[u]nder these circumstances, it is the defendant's 'privilege' to withhold the claim from his direct claim and pursue it in collateral proceedings." App., *infra*, 12a. The district court also held, however, that petitioner's Fifth Amendment claim *was* barred because, even though he had not

asserted such a claim in his direct appeal, "the Seventh Circuit applied nothing less than the test for determining whether a criminal suspect has waived his constitutional right to remain silent." *Id.* at 9a. Thus, according to the district court, the fact that the Seventh Circuit had ruled on voluntariness was itself sufficient to procedurally bar any Fifth Amendment claims that petitioner might have. Although the district court acknowledged that petitioner sought to rely "on evidence outside the trial record" in support of his Fifth Amendment claim, the court ignored the contention that petitioner's claim could not be procedurally defaulted because it was based on extra-record evidence and was inextricably intertwined with petitioner's timely ineffective-assistance claim.

On April 16, 2001, petitioner moved to vacate the dismissal pursuant to Fed. R. Civ. P. 59(e) and 60(b) in order to allow him an opportunity to develop extra-record evidence in support of his claims, as he originally had requested. R. 19. In support of that motion, petitioner submitted a detailed affidavit of his own supporting the merits of his claims. A33-A37.

On July 10, 2001, the district court denied petitioner's motion, and also refused to issue a Certificate of Appealability ("COA"), holding that even if petitioner's Fifth Amendment claim was not procedurally barred, the facts alleged by petitioner "do not bear significantly" on whether petitioner's Fifth Amendment rights were violated:

> Krilich claims that his attorney and the Assistant United States Attorney with whom he negotiated the proffer agreement misled him regarding the circumstances under which the Government would seek admission of his proffer statements if the case ultimately proceeded to trial. These facts, even if true, do not bear significantly on the question of whether Krilich knowingly and voluntarily waived certain rights by signing the proffer agreement.

App., *infra*, 22a. The court also refused to allow petitioner to develop a factual record in support of his Fifth Amendment and ineffective assistance claims, and then denied a Certificate of Appealability ("COA") as to the court's rulings. On appeal, the Seventh Circuit also denied petitioner's request for a COA. App., *infra*., 1a.

REASONS FOR GRANTING THE PETITION

The district court held that, because the court of appeals on direct appeal ruled on the voluntariness of petitioner's waiver of his statutory rights under Fed. R. Evid. 410 and Fed. R. Crim. P. 11(e)(6) to exclude his proffer statements, he was procedurally barred from claiming on collateral review that the admission of the proffer statements violated his Fifth Amendment rights. According to the district court, because the issue of statutory voluntariness was raised on direct appeal, petitioner was barred from seeking habeas review of his separate, Fifth Amendment claim, regardless of whether this claim depended on extra-record evidence.

This ruling is flatly contrary to this Court's precedent and further muddles an already-confused split among federal courts as to when a federal prisoner may seek collateral review of a claim that depends on extra-record evidence but is related to another issue that was previously addressed on direct appeal. Some courts allow collateral review when there is relevant evidence that the petitioner was unable to introduce into the record. See, *e.g.*, *United States v. Palumbo*, 608 F.2d 529, 533 (3d Cir. 1979). Other cases employ the cause and prejudice or actual innocence standard applicable to a prisoner who defaults by failing to raise an issue on direct appeal. This standard, however, is wholly inappropriate for the federal prisoner who has raised a claim on appeal but who, unlike the state prisoner who can develop evidence in state habeas proceedings, has not had an opportunity to introduce evidence critical to his federal habeas claim. See, *e.g.*, *United States v. Wiley*, 245 F.3d 750, 752 (8th Cir. 2001). The district court in this case strayed from

both of these views, erecting an absolute bar to collateral review, notwithstanding petitioner's reliance in his § 2255 petition on extra-record evidence that he was unable to develop at trial.

This Court should grant the petition to resolve this important split and to clarify the law concerning the impact of rulings on direct appeal on the rights of habeas petitioners to seek collateral review of related issues under § 2255 that depend on extra-record evidence. Indeed, the split among the federal courts reveals pervasive confusion on at least three levels of habeas corpus jurisprudence.

First, there is confusion over the extent to which this Court's § 2254 precedents have overruled by implication earlier holdings applicable to § 2255 review, and, more specifically, the extent to which this Court's procedural default holdings apply to claims preserved on direct appeal. This Court's last word on this issue came in 1969, see *Kaufman v. United States*, 394 U.S. 217, 227 & n.8 (1969), but since then, decisions from the § 2254 context, see, *e.g.*, *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), and from other procedural default contexts, see, *e.g.*, *Davis v. United States*, 411 U.S. 233, 242 (1973), have caused some courts to abandon *Kaufman*'s holding.

Second, while this Court has addressed the effect of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) on the ability of a *state* prisoner to seek habeas relief based on facts outside the state-proceeding record, see *Williams v. Taylor*, 529 U.S. 420 (2000), the post-AEDPA rules for federal prisoners are still deeply confused.

Third, the interests of comity and federalism, and of the availability of state collateral review, see *Coleman v. Thompson*, 501 U.S. 722, 726, 729-730 (1991), which have motivated this Court's decisions interpreting § 2254, do not apply to § 2255 petitions. The federal courts are therefore in vital need of guidance as to whether, and to what extent, this

Court's procedural default precedents under § 2254 have any application to § 2255.

The district court also erred in its resolution of the merits of petitioner's Fifth Amendment claim. The court concluded that false assurances by a prosecutor and defense counsel as to the circumstances under which a defendant's incriminating proffer statements may be used at trial (which in this case, according to the Seventh Circuit, precluded defendant even from cross-examining the Government's witnesses without opening the door to the admission of his proffer statements), have no "significant[]" bearing on the viability of defendant's Fifth Amendment waiver. This holding flatly contradicts this Court's holdings in other waiver contexts, and marks a sharp split with the approach that other federal courts have taken to evaluating the viability of Fifth Amendment waivers.

This Court and other federal courts have recognized that prosecutorial misstatements about the consequences of a constitutional waiver undermine the waiver's voluntariness. This is especially so here, where the government assured petitioner that his statements could only be used if he took the stand himself and contradicted his proffered statements, and where there were no available procedural safeguards (such as those that apply in the plea context), to ensure that petitioner's waiver was knowing and voluntary. Notwithstanding its assurances to petitioner, the Government proceeded to argue at trial that petitioner violated the proffer agreement, even though he never took the witness stand, by cross-examining government witnesses in a manner contrary to his proffer statements. The trial court and court of appeals agreed, allowing into evidence petitioner's incriminating proffer statements to rehabilitate prosecution witnesses in the Government's rebuttal case. This prosecutorial about-face devastated petitioner's trial strategy and his chances for an acquittal. The district court's holding that the Government's misrepresentations on this score did not affect the voluntariness of petitioner's plea is not only illogical and manifestly unfair,

but flies in the face of established jurisprudence from this and other federal courts.

In short, this case presents an ideal opportunity for the Court to address and resolve the split among the federal courts over the procedural default rules that govern 28 U.S.C. § 2255, and the extent to which Fifth Amendment waivers can be vitiated by false prosecution assurances.[1] At a minimum, this case satisfies the liberal standard for issuance of a COA. Indeed, for the reasons set forth below, "jurists of reason" would easily find the district court's procedural and substantive rulings "debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (articulating standard for issuance of COA). Accordingly, even if the Court declines to reach the merits of petitioner's procedural and constitutional claims, the court of appeals should be directed to grant petitioner's application for a COA and to hear his appeal from the district court's denial of his § 2255 petition on the merits.

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[1] The Seventh Circuit's refusal to issue petitioner a Certificate of Appealability ("COA") is no impediment to this Court's review of petitioner's claims. This Court "has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability by a circuit judge or a panel of a court of appeals." *Hohn v. United States*, 524 U.S. 236, 253 (1998). In fact, the Court has exercised this jurisdiction repeatedly, reaching the merits of the underlying claims without regard to the COA denial. See, *e.g.*, *Penry v. Johnson*, 532 U.S. 782 (2001); *Weeks v. Angelone*, 528 U.S. 225 (2000); see also *Lynce v. Mathis*, 519 U.S. 433 (1997) (certificate of probable cause, precursor to COA); *Allen v. Hardy*, 478 U.S. 255 (1986) (same); *Smith v. Digmon*, 434 U.S. 332 (1978) (same); *Walker v. Wainwright*, 390 U.S. 335 (1968) (same).

ARGUMENT

I. PETITIONER'S FIFTH AMENDMENT CLAIM WAS NOT PROCEDURALLY BARRED BECAUSE IT WAS BASED ON EXTRA-RECORD EVIDENCE THAT HE WAS FORECLOSED FROM DEVELOPING AS PART OF THE ORIGINAL TRIAL RECORD.

The federal courts are split over the applicable standard for determining whether claims on collateral review under § 2255 are procedurally barred where related claims were addressed on direct appeal. Some courts allow collateral review when there are "new facts or new law," based upon a showing that there is relevant evidence that the petitioner was unable to enter into the record, newly discovered evidence, or a change in the law that would apply on collateral review. See *United States v. Palumbo*, 608 F.2d 529, 533 (3d Cir. 1979) (adding "other circumstances indicating that an accused did not receive full and fair consideration of his federal constitutional and statutory claims"); *United States v. Little*, 608 F.2d 296, 301 (8th Cir. 1979); *United States v. Abbott*, 975 F. Supp. 703, 705 (E.D. Pa. 1997) (following *Palumbo*); *Scire v. United States*, 1997 WL 138991, at *3 (E.D.N.Y. Mar. 24, 1997) (distinguishing between claims procedurally defaulted and claims raised and rejected on appeal).[2]

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[2] Some of these courts note that a party relying on evidence outside the record must show that the facts could not reasonably have been introduced at trial. See *United States v. Nyhuis*, 211 F.3d 1340, 1343 (11th Cir. 2000) (refusing to address issue decided on direct appeal unless claim on collateral review is based on facts that could not reasonably have been discovered before trial); *Giacalone v. United States*, 739 F.2d 40, 43 (2d Cir. 1984) (rejecting claim of new evidence because facts could have been raised at trial with reasonable diligence of counsel); *United States v. Robinson*, 585 F.2d 274, 278-280 (7th Cir. 1978) (en banc) (refusing to address issue decided on direct appeal unless claim on collateral review is based on facts that could not reasonably have been discovered before trial).

Other cases use the "cause and prejudice or actual innocence" standard that applies to issues that a prisoner defaulted by failing to raise on direct appeal. See *United States v. Galloway*, 56 F.3d 1239, 1242 (10th Cir. 1995) (en banc) (stating that, generally, court "must" apply cause and prejudice standard to § 2255 claims that were decided on direct appeal, but creating exception for ineffective assistance claims); *United States v. Wiley*, 245 F.3d 750, 752 (8th Cir. 2001) (allowing collateral review of issues decided on direct appeal only when new evidence demonstrates actual innocence); *United States v. Hope*, 1993 WL 135751, *3 (N.D. Ill. Apr. 28, 1993) ("[F]or this court to consider new facts or evidence brought forth by the petitioner, the petitioner must first satisfy the cause-and-prejudice standard set forth in *Keeney v. Tamayo-Reyes*, [504 U.S. 1, 8 (1992)]"), appeal dismissed, 43 F.3d 1140 (7th Cir. 1994); *United States v. Marin-Pineda*, 1992 WL 300824, *1 (E.D. La. Oct. 7, 1992) (requiring "new evidence to support a colorable claim of factual innocence"). As explained below, this standard—imported from the § 2254 context—is manifestly unfair in § 2255 cases because the federal prisoner, unlike his state counterpart, may, as in this case, never have had the chance to develop extra-record evidence.

In the instant case, the district court held that a court of appeals' resolution of a related issue on direct appeal barred consideration of the issue on collateral review, notwithstanding the fact that petitioner sought to base his habeas claim on evidence outside the original trial record and without regard to

whether petitioner could demonstrate cause and prejudice.[3] App., *infra*, 8a-10a, 21a-22a.

This split in the circuits has roots going back fifty years to this Court's original holding that habeas corpus is available to address claims relying on extra-record evidence. The modern understanding of habeas corpus review is traceable to *Waley v. Johnston*, 316 U.S. 101, 104-105 (1942), in which this Court abandoned the fiction that the Great Writ can only be used to collaterally attack a judgment of conviction rendered without jurisdiction. In so doing, the Court held that a claim may be raised on federal collateral review whenever "[t]he facts relied on are dehors the record and their effect on the judgment was not open to consideration and review on appeal." *Id.* at 104.

Later cases reiterated that allegations of evidence "dehors the record" entitled a prisoner to habeas review of factual allegations. *Townsend v. Sain*, 372 U.S. 293 (1963), a § 2254 case, was the first decision to specify the conditions under which a federal court would consider factual issues that were ruled on at trial and on direct appeal. *Townsend* listed six grounds for granting an evidentiary hearing, one of which was that "the material facts were not adequately developed at the state-court hearing." *Id.* at 313. The basic principle underlying *Townsend* was that a prisoner has a right to a "full and fair hearing" of a constitutional claim, and that a hearing

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[3] As noted above, the district court ruled that because on petitioner's direct appeal the Seventh Circuit had ruled on the voluntariness of his waiver of Rule 410 and 11(e)(6) rights, petitioner was procedurally barred from raising a claim that his proffer was involuntary under the Fifth Amendment. The district court ignored petitioner's argument that his Fifth Amendment claim relied on facts outside the record, stating instead that the fact that voluntariness had been raised on direct appeal was sufficient, standing alone, to bar petitioner's Fifth Amendment claim on collateral review. Petitioner sought a COA on this ruling, but the Seventh Circuit rejected his application.

without the opportunity to completely develop the facts was not "full and fair." *Id.*

In *Kaufman v. United States*, 394 U.S. 217 (1969), this Court held that the logic of *Townsend* applied to § 2255. Thus, if facts were inadequately developed in a federal trial, § 2255 entitled a prisoner to an evidentiary hearing unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." *Id.* at 227 & n.8 (quoting 28 U.S.C. § 2255). Thus, by 1969, *Townsend* and *Kaufman* entitled state and federal prisoners to a hearing under § 2254 and § 2255, respectively, when their claims relied on evidence outside the record at trial, regardless of whether the prisoner's legal claim had been raised in earlier proceedings.[4]

This Court soon recognized a distinction between cases in which the prisoner had raised a claim on appeal and cases in which the prisoner has not. The Court first held that failure to timely raise an issue could constitute procedural default in *Davis v. United States*, 411 U.S. 233 (1973). *Davis* held that a § 2255 petitioner procedurally defaulted a constitutional challenge to his indictment by failing to comply with Fed. R. Crim. P. 12(b)(2), which requires challenges to the indictment to be raised before trial. *Davis* further held that a prisoner can overcome the default by demonstrating cause and prejudice for the default. *Id.* at 242. The cause and prejudice standard was subsequently applied to procedural defaults under state law. See *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).

Since *Sykes*, the law of procedural default has evolved almost exclusively in the § 2254 context. See, *e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (cause and prejudice standard applies to all defaults under an independent and

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[4] A narrow exception to this liberal rule was provided by *Fay v. Noia*, 372 U.S. 391, 439 (1963), which held that a prisoner who deliberately bypassed appellate procedures or state-court collateral review was barred from seeking federal habeas relief.

adequate state procedural rule); *McClesky v. Zant*, 499 U.S. 467, 493 (1991) (cause and prejudice standard applies to abuse of writ); *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (cause must be external to the defense or rise to the level of ineffective assistance of counsel).

Indeed, in the § 2254 context, this Court has developed a coherent doctrine of procedural default that is detached from its original ties to federal collateral review under § 2255. The doctrine of procedural default, this Court has explained, operates as a necessary corollary to the "independent and adequate state ground" doctrine, *Coleman,* 501 U.S. at 730, and is "grounded in concerns of comity and federalism." *Id.* at 729-730; see also *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000).

Recognizing the availability of collateral remedies under state law and the importance of federalism, this Court has held that failure to develop evidence in state proceedings amounts to a procedural default. *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), held that a petitioner who failed to develop facts in a state-court collateral review proceeding must demonstrate cause and prejudice, or make a showing of actual innocence, before an evidentiary hearing on habeas review in federal court is allowed. *Id.* at 11-12. In so doing, the *Tamayo-Reyes* Court explicitly overruled the holding in *Townsend v. Sain* that the inadequate development of evidence in state court justified a federal evidentiary hearing. *Id.* at 5-6.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) codified the holding of *Tamayo-Reyes*. See 28 U.S.C. § 2254(e)(2). But the AEDPA did not alter the language of § 2255 governing when a petitioner is entitled to an evidentiary hearing; the language remains the same as it was when *Kaufman* was decided over thirty years ago.

Thus, the split among the federal courts reflects apparent confusion surrounding three issues: First, although *Tamayo-Reyes* overruled the holding of *Townsend* as it applies

to evidence not developed in state collateral review proceedings, this Court has not overruled the holding of *Kaufman* as it applies to evidence not developed in *federal* trial proceedings. In the absence of a definitive pronouncement from this Court, some lower courts still follow the rationale of *Kaufman*, while others recite the cause and prejudice standard of *Tamayo-Reyes*.[5]

Second, although most of the courts divided on this issue do not address the text of § 2255, federal post-conviction review is obviously statutory in nature. See, *e.g.*, *Williams v. Taylor*, 529 U.S. 420, 431 (2000) ("We start, as always, with the language of the statute") (interpreting § 2254). Congress, in enacting the AEDPA, significantly modified both § 2254 and § 2255. As amended, § 2254 now codifies the holding of *Tamayo-Reyes* that failure to develop facts in state collateral review proceedings is a procedural default. *Williams*, 529 U.S. at 432-33. But while the AEDPA made significant changes to § 2255, it left unaltered the portion of § 2255 that *Kaufman* interpreted to allow collateral review when the federal prisoner proffers evidence "dehors the record." See 28 U.S.C. § 2255 (2001) ("Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall * * * grant a prompt hearing thereon"). Ordinary principles of statutory construction thus dictate that—with respect to claims relying on evidence outside the record—these statutory sections mean different things.

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[5] In a recent § 2255 ruling, this Court referred to the *Waley* "dehors the record" rule as "an exception to the procedural default rule for claims that could not be presented without further factual development." *Bousley v. United States*, 523 U.S. 614, 621 (1998). Because the petitioner's claim in *Bousley* relied solely on evidence in the record, this Court had no opportunity to clarify the relationship between the dehors the record "exception" and the procedural default rule. *Id.*

Third, although the interest in finality applies to both state and federal convictions, the interests in comity and federalism motivating the decisions in *Tamayo-Reyes* and other § 2254 cases apply only to review of state-court convictions. Further, in *Tamayo-Reyes* the state prisoner had a prior, state habeas hearing in which he could develop evidence that was outside the trial record. A federal prisoner who is unable to create a record at trial, in contrast, has only one opportunity to develop such evidence: a § 2255 hearing. Because this Court's cases on collateral review primarily have been § 2254 cases, there is no Supreme Court guidance as to how to balance the concerns of finality and efficiency with the vindication of constitutional rights when concerns about federalism do not tip the scale.

The likely source of this circuit split is a misunderstanding of how the "cause and prejudice" standard applies in this context. As this Court explained in *Williams*, 529 U.S. at 436, courts should "not equate prisoners who exercise diligence in pursuing their claims with those who do not." When an issue has been raised and decided on appeal, the prisoner has preserved the issue, not waived it. Thus, in the context of claims relying on evidence outside the record, procedural default arises not from the fact that the issue was previously decided, but from the prisoner's failure to attempt to introduce the facts into the record at trial. See *Williams*, 529 U.S. at 432. In this context, "failure" to develop facts requires some fault, some lack of diligence, on the prisoner's part. *Id.* Thus, even under § 2254, a claim relying on evidence outside the record of state-court proceedings is not procedurally defaulted if a state prisoner acted with diligence in attempting to develop the facts.

Therefore, courts should not invoke the cause and prejudice standard until they have determined that the prisoner has in fact procedurally defaulted. This raises a two-step inquiry. First, the court may decline to revisit an issue decided on direct appeal if the prisoner has raised no new facts or applicable law that could possibly change the outcome. This is the holding of *Kaufman*, 394 U.S. at 226-227 & n.8. Second, if the prisoner

does allege new facts, the § 2255 court must determine whether the absence from the record of the facts proffered by the prisoner is due to a lack of diligence by the prisoner in attempting to discover those facts and bring them to the trial court's attention. If so, only then must the court require the prisoner to show cause for the default and prejudice.

Application of the *Kaufman* standard in the instant case would entitle petitioner to an evidentiary hearing and resolution of the merits of his Fifth Amendment claim. This claim is based entirely on evidence whose absence from the trial record is not the result of any lack of diligence on petitioner's part. Petitioner claims that the admission of his incriminating proffer statements violated his Fifth Amendment rights. This claim depends on extra-record evidence that he was prevented from developing at his original trial, including the testimony of AUSA King and his own counsel concerning their representations to petitioner as to the circumstances under which his proffer statements could be used against him at trial. Petitioner cannot be faulted for being unable to compel the testimony of the very AUSA that served as lead counsel for the prosecution at petitioner's trial. Indeed, AUSA King would have been put in the position of vouching to the credibility of the confession he sought to enter into the record. No standard of diligence could possibly require a prisoner to achieve such absurd results; courts have openly recognized this in other contexts. See, *e.g.*, *Page v. United States*, 884 F.2d 300, 301 (7th Cir. 1989) ("Few of us have insight into our shortcomings; fewer still have the nerve to flaunt our own failings * * * . [T]rial counsel need not attack his competence during trial.").[6] Moreover, the record confirms that petitioner attempted to testify during the original trial proceedings as to the misrepresentations on which he relied in agreeing to make the

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[6] As noted above, petitioner tried to tell the court, "The Government lied," but was not heard. Tr. 9/11/95 at 2390.

incriminating proffer statements, and was ignored by both the court and his counsel. See *supra* at pp. 4-5.

In this case, however, the lower courts erected an absolute bar to raising issues decided on direct appeal regardless of whether the § 2255 claim depended on extra-record evidence. Not only is this procedural bar contrary to the governing statute and Supreme Court precedent, but the injustice of applying it is apparent from the district court's treatment of petitioner in this case.

The district court essentially used its procedural bar holding to whipsaw petitioner between his Fifth and Sixth Amendment claims. On direct appeal, the Seventh Circuit berated petitioner's claimed understanding of the proffer agreement as "unnatural," "unrealistic," and as invoking "Humpty Dumpty's power over language," 159 F.3d at 1025-1026. And on collateral review, the district court held that the Seventh Circuit's decision procedurally barred Krilich from arguing that his waiver was not intelligent and knowing, even though he proffered evidence (that was "dehors" the record) to show that his counsel and AUSA King led him to believe their "Humpty Dumpty" interpretation of the proffer agreement was correct.

Yet the district court did not rely on the Seventh Circuit's ruling to find that petitioner's counsel rendered unreasonable assistance.[7] Instead, the court held that counsel's "Humpty

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[7] Ironically, the district court entertained Krilich's ineffective assistance claim, noting (correctly) that it was not procedurally barred *because it relied on evidence outside the record*. The courts of appeals unanimously find ineffective assistance claims not barred on collateral review, even if first raised on direct appeal. See, *e.g.*, *Billy-Eko v. United States*, 8 F.3d 111, 114 (2d Cir. 1993) ("Primarily, though, ineffective assistance claims are appropriately brought in § 2255 petitions even if overlooked on direct appeal because resolution of such claims often requires consideration of matters outside the record on direct appeal"); *United States v. Higdon*, 832 F.2d 312, 313-314 (5th Cir. 1987) (declining to address

Dumpty" interpretation of the proffer agreement was reasonable, citing petitioner's evidence that his counsel's misinterpretation was shared by AUSA King. Thus, when petitioner attempted to show that his counsel and the prosecutor led him to adopt a "Humpty Dumpty" interpretation of the proffer agreement, the district court held that extra-record evidence could be used to show that counsel was reasonable in giving the wrong advice to petitioner, but not to show that petitioner's Fifth Amendment waiver was involuntary.

In short, petitioner's Fifth Amendment claim is based entirely on extra-record evidence he was never allowed to develop at his trial. He was thus denied a full and fair hearing on this claim because he did not bring his § 2255 petition in a circuit that properly permits habeas review where, as here, a habeas petitioner's challenge rests on evidence that petitioner was unable to make a part of the trial record.

II. THE LOWER COURTS' REFUSAL TO ISSUE A CERTIFICATE OF APPEALABILITY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

In his § 2255 petition, petitioner argued that he did not knowingly, intelligently, or voluntarily waive his Fifth Amendment rights when he entered into the proffer agreement with federal authorities. Petitioner claimed, specifically, that he agreed to make the inculpatory statements only after both his attorney and AUSA King assured him (falsely) that the government could only introduce such statements to impeach petitioner's testimony if he took the stand and contradicted his proffer.

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claim on direct appeal when "no opportunity existed to develop the record on the merits of the allegations" but noting that claim may be brought under section 2255 although raised on direct appeal); *United States v. Carlson*, 561 F.2d 105, 109 (1st Cir. 1977) (citing *Waley*).

Although petitioner was unable to develop a factual record on these misrepresentations at trial, the district court refused to consider his Fifth Amendment claim when petitioner sought to raise it in his petition under § 2255. The court's refusal followed from its holding that, "even if true, [the allegations of misstatements by petitioner's counsel and the prosecutor] do not bear significantly on the question of whether [petitioner] knowingly and voluntarily waived" his Fifth Amendment "rights by signing the proffer agreement." App., *infra*, 22a. The district court thus concluded, as a matter of law, that false assurances that petitioner's inculpatory statements would not be used unless he took the stand and contradicted his proffer could not render his Fifth Amendment waiver unknowing, unintelligent, or involuntary.

This holding is squarely contrary to a long line of this Court's decisions and the approach taken by other federal courts. This Court has made plain, for example, that a guilty plea is involuntary when induced by government "misrepresentation" about the consequences of the plea. *Brady v. United States*, 397 U.S. 742, 755, 757 (1970); see also *Machibroda v. United States*, 368 U.S. 487, 493 (1962) (holding that petitioner was entitled to habeas relief if guilty plea was induced by prosecutorial misrepresentations about total sentence petitioner would receive if he pled guilty); see also *United States v. Russell*, 686 F.2d 35, 41 (D.C. Cir. 1982) (prosecutor misrepresented deportation consequences of plea); *United States v. El-Nobani*, 145 F. Supp. 2d 906, 917-918 (N.D. Ohio 2001) (same); *West v. Johnson*, 2001 WL 461002, at *6-*8 (N.D. Tex. Apr. 30, 2001) (prosecutor did not fulfill oral promise regarding sentence, notwithstanding Government's adherence to language of plea agreement); *Quartararo v. Mantello*, 715 F. Supp. 449, 459-462 (E.D.N.Y.) (police misstatement regarding co-defendant confession and false promise of leniency), *aff'd*, 888 F.2d 126 (2d Cir. 1989); *United States v. Ready*, 82 F.3d 551, 556-558 (2d Cir. 1996) (defendant did not knowingly waive right to appeal illegal sentence due to

misleading statements by court). Indeed, "[w]hen the record indicates that the defendant's plea has been induced by inaccurate prosecutorial suggestions about its consequences, * * * the plea cannot be considered voluntary and must be vacated." *Russell*, 686 F.2d at 41; see also *United States v. Parrino*, 212 F.2d 919, 921 (2d Cir. 1954) (recognizing that guilty plea induced by misinformation from court or prosecutor may be basis for relief).

This principle is not limited to guilty pleas. Courts have repeatedly refused to admit confessions and other self-incriminating statements when they were induced by false assurances (innocent or not) about their potential uses and consequences. Thus, for example, in *United States v. Swint*, 15 F.3d 286, 287 (3d Cir. 1994), the defendant met with a state prosecutor "to make an off-the-record proffer regarding the cooperation he could provide in exchange for a negotiated plea" on pending state charges. During the meeting, however, federal agents entered the room and questioned defendant about conduct related to possible federal charges, and defendant made self-incriminating statements in response. The district court excluded these statements from defendant's federal trial as involuntary, and the Third Circuit affirmed, citing "the government's misleading conduct" and defendant's resulting confusion over the prosecution's ability to use his purportedly "off-the-record" statements against him at trial. *Id.* at 289-292; see also *United States v. Walton*, 10 F.3d 1024, 1028-1032 (3d Cir. 1993) (statements inadmissible where defendant was told that statements to agents would be off the record).

Likewise, in *United States v. Fronk*, 173 F.R.D. 59 (W.D.N.Y. 1997), defense counsel claimed that the Government had assured him that nothing his client said in preliminary discussions would be used against him at trial. Although the AUSA denied making any such assurance, the Government failed to meet its burden of proof on this score, and the court held that the prosecutor's false assurance rendered defendant's waiver involuntary. *Id.* at 71; see also *United*

States v. Heatley, 39 F. Supp. 2d 287, 299 (S.D.N.Y. 1998) (holding that government should "be held to its assurances if [its] assurances were relied upon by the defendant in deciding whether to enter a proffer session" and that, "[i]n order for the waiver of [Fifth Amendment] rights to be truly knowing, voluntary, and intelligent, there must be some assurance that the promises made by the government which induce that waiver will be enforced"); *United States v. Rogers*, 906 F.2d 189, 192 (5th Cir. 1990) (holding confession involuntary where defendant was misled into thinking that he would not be prosecuted); *United States v. Salisbury*, 966 F. Supp. 1082, 1085-1087 (N.D. Ala. 1997) (holding statements involuntary where investigator misled defendant into thinking that another individual, not defendant, was the target of investigation), appeal dismissed, 158 F.3d 1204 (11th Cir. 1998). But see *United States v. Byram*, 145 F.3d 405, 408 (1st Cir. 1998) (holding that statement is not involuntary even if made after detective's false suggestion that defendant was not subject of investigation).

This case involves a straightforward application of this general principle that inculpatory statements induced by false prosecutorial assurances are inadmissible under the Fifth Amendment. Here, the Government induced petitioner to waive his Fifth Amendment rights with the specific assurance that his statements would only be admitted if he took the stand and contradicted his proffer. This was a powerful misrepresentation of incredible significance to petitioner—one that led him not to take the witness stand in his own defense. There is a critical distinction between using inculpatory statements solely to rebut the defendant's testimony, and using them instead (as prosecutors did here) to counter defendant's cross-examination of government witnesses. Indeed, permitting the Government to introduce a proffer based on defense counsel's cross-examination strategy or counsel's arguments to the jury interferes with a defendant's "Sixth Amendment rights to cross-examination, to make closing arguments, or to call

witnesses on [the defendant's] behalf." *United States v. Lauersen*, 2000 WL 1693538, at *7 (S.D.N.Y. Nov. 13, 2000); see also *United States v. Duffy*, 133 F. Supp. 2d 213, 216-218 (E.D.N.Y. 2001) (expressly rejecting Seventh Circuit's decision on direct appeal in this case and holding that proffer agreement permitting Government to use proffer statements as Government did in petitioner's case constitutes unenforceable waiver of Sixth Amendment rights to advance defense and to effective assistance of trial counsel). At least one court has thus acknowledged the "groundswell of doubt * * * concerning the enforceability of [a] waiver contained in [a] Proffer Agreement, 'at least when the waiver extends beyond the use of the statements to impeach the defendant.'" *Lauersen*, 2000 WL 1693538, at *8 (citing cases, including *United States v. Mezzanatto*, 513 U.S. 196, 211 (1995) (Ginsburg, J., concurring)).

Given the crucial distinction between using a proffer in rebuttal and introducing it in the prosecution's case in chief, it is no surprise that false promises like those at issue here—where the prosecutor falsely assures the defendant that inculpatory statements will only be used to rebut the defendant's own trial testimony—have been found to render the defendant's statements inadmissible. Thus, for example, in *United States v. Rowley*, 975 F.2d 1357, 1360 (8th Cir. 1992), federal prosecutors elicited self-incriminating information from the defendant by assuring him that such information would only be used for purposes of impeachment. Because the Government had in fact used the information solely for these purposes, the Eighth Circuit held, defendant's Fifth Amendment claim failed. But the Court of Appeals recognized that "[a]ny breach of [the Government's] promise [to limit use of defendant's statement to impeachment] would, of course,

render his statements" involuntary and, accordingly, "unusable." *Id.* at 1362.[8]

This same principle was used to limit drastically the admissibility of a proffer statement in *Lauersen*. The defendant in that case entered into a proffer agreement allowing federal prosecutors to "'use statements made by [defendant] * * * and all evidence obtained directly or indirectly therefrom for the purpose of cross-examination should [defendant] testify, or to rebut any evidence or arguments offered by or on behalf of [defendant] * * * at any stage of the criminal prosecution.'" 2000 WL 1693538, at *2. Although the agreement included this permissive language, neither the defendant's attorney nor the prosecutor informed her that the Government could use defendant's proffer statements—as the Government did at petitioner's trial—to rebut positions advanced by defense counsel during opening/closing arguments or during cross-examination of government witnesses. *Id.* at *7. The district court concluded that, under these circumstances, "the Government ha[d] not demonstrated that [defendant] knowingly waived her rights as to the admissibility of statements made during her proffer for purposes beyond impeachment," and the court therefore held that defendant's "waiver [was] valid only to the extent it permit[ted] the Government to use her proffer statements for impeachment purposes should she testify." *Ibid.*

Petitioner plainly would have prevailed under the legal rule recognized in *Rowley* and *Lauersen*, a rule itself derived from the "voluntariness" principles articulated by this Court and established in the courts of appeals. The proffer agreement petitioner signed—which permitted the Government to use petitioner's statements "for impeachment or in rebuttal testimony"—was not nearly as informative as the agreement in

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[8] The court went so far as to implore prosecutors to instruct defendants in even greater detail on possible uses of their pre-trial statements, "[t]o avoid a ruling that information proffered will be considered involuntarily given." 975 F.2d at 1362 n.4.

that case. Nor was petitioner's proffer merely "incompletely explained," as it was in *Lauersen*. Petitioner has alleged that AUSA King, not to mention petitioner's own lawyer, affirmatively misinformed petitioner that his statements were inadmissible unless he took the stand and personally advanced a contrary position. Far from providing relief on this ground, however, the district court here deemed these misrepresentations "insignificant" to petitioner's Fifth Amendment claim as a matter of law, and the Seventh Circuit found this ruling so obviously correct as to be unworthy of review.

* * * * *

This case presents an opportunity for the Court to resolve a conflict among the federal courts over the Fifth Amendment implications of prosecutorial misstatements that induce a self-incriminating proffer. The Seventh Circuit has taken a position on this critical issue at odds with the rule applied by other courts of appeals and district courts, and the Seventh Circuit's position flies in the face of this Court's jurisprudence.

CONCLUSION

The petition for writ of certiorari should be granted for this Court's resolution of the questions presented on their merits. Alternatively, the decision of the court of appeals should be vacated and the court of appeals instructed to issue a certificate of appealability as to the questions raised in this petition.

Respectfully submitted.

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